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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELROD and

TYRONE C. FAHNER, Attorney General,
State of Illinois,

Petitioner,

vs.

BENEDETTO J. MASSARELLA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner

E. JAMES GILDEA
Special Assistant Attorney General
401 North Michigan Avenue, Suite 3400
Chicago, Illinois 60611
(312) 222-0800

Of Counsel

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QUESTION PRESENTED FOR REVIEW

Whether the opinion of the court of appeals holding that a habeas corpus petitioner's voluntary election to be sentenced under a statute enacted after his offense violates the *ex post facto* clause conflicts with this Court's decisions in *Francis v. Henderson*, *Wainwright v. Sykes*, and *Engle v. Isaac*.

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In The

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October Term, 1982

TYRONE C. FAHNER, Attorney General,
State of Illinois,

Petitioner,

vs.

BENEDETTO J. MASSARELLA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit holding that a habeas corpus petitioner incurred *ex post facto* punishment when the State of Illinois permitted him to elect between two successive criminal statutes at the time of his sentencing. The court below decided, contrary to holdings of the Illinois courts, that the statute which the petitioner elected to be sentenced under subjected him to

enhanced collateral consequences, and it ordered the state to resentence him under the former statute without regard to the right of election provided for in the Illinois statutes. *United States ex rel. Massarella v. Elrod*, ... F.2d ..... (7th Cir. 1982). (Appendix A at 5a).

The court of appeals thereby reversed a decision of the United States District Court for the Northern District of Illinois which held that the petitioner's election to be sentenced under the laws in effect at the time of sentencing was in accordance with his desires and therefore not violative of the *ex post facto* clause. *United States ex rel. Massarella v. Elrod*, 510 F.Supp. 1082 (N.D. Ill. 1981). (Appendix B at 3b).

Prior to the filing of the petition for writ of habeas corpus, the Illinois Appellate Court had affirmed the petitioner's conviction for reasons similar to those expressed by the federal district court. *People v. Massarella*, 80 Ill.App.3d 552, 400 N.E.2d 436 (1st Dist. 1979). (Appendix C at 5c). Also, the Illinois Supreme Court had denied, without comment, a petition for leave to appeal from the appellate court's decision. *People v. Massarella*, 81 Ill.2d 586 (1980).

This Court previously denied a petition for writ of certiorari of the defendant seeking to reverse the decision of the Illinois Appellate Court. *Massarella v. Illinois*, 449 U.S. 1077 (1981).

JURISDICTION

The court of appeals' decision was rendered on July 14, 1982. A petition for rehearing was denied September 23, 1982. This petition is sought to be filed within 90 days of the date the court of appeals denied the petition for rehearing as required by 28 U.S.C. §2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitution

Article I, Section 10, Cl. 1:

"No State shall . . . pass any . . . ex post facto law. . . ."

STATUTES

Illinois Revised Statutes, 1971

Chapter 38, Section 2-7:

"Felony" means an offense punishable with death or by imprisonment in the penitentiary."

Chapter 38, Section 2-11:

"Misdemeanor" means any offense other than a felony and includes conduct prohibited by a statute which provides no penalty for its violation.

Chapter 38, Section 32-2:

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a

false statement, material to the issue or point in question, which he does not believe to be true.

Penalty.

A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned.

Illinois Revised Statutes, 1973

Chapter 38, Section 32-2:

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

* * *

(d) Sentence.

Perjury is a Class 3 felony.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Chapter 38, Section 1005-1-4:

"Conditional Discharge" means a sentence or disposition of conditional and revocable release without probationary supervision but under such conditions as may be imposed by the court.

Chapter 38, Section 1005-5-3:

(a) Every person convicted of an offense shall be sentenced as provided in this Section, except in cases of murder to which Section 5-8-1A of this Code is applicable.

* * *

(d) When a defendant is convicted of a felony or misdemeanor, the court may sentence such defendant to:

(1) a period of probation or conditional discharge except in cases of murder, rape, armed robbery, violation of Sections 401(a), 402(a), 405(a) or 407 of the Illinois Controlled Substances Act or violation of Section 9 of the Cannabis Control Act;

(2) a term of periodic imprisonment;

(3) a term of imprisonment;

(4) a fine. However, a fine shall not be the sole disposition in felony cases but may be imposed in such cases only in addition to another disposition under paragraph (d) of this Section.

Chapter 38, Section 1005-7-1:

(a) A sentence of periodic imprisonment is a sentence of imprisonment during which the committed person may be released for periods of time during the day or night or for periods of days, or both. Unless the court orders otherwise, the particular times of release shall be determined by the Department of Corrections, the sheriff, or the Superintendent of the house of corrections, who is administering the program.

* * *

(c) The court may impose a sentence of periodic imprisonment for a felony or misdemeanor on a person who is 17 years of age or older. The court shall not impose a sentence of periodic imprisonment if it imposes a sentence of imprisonment upon the defendant.

(d) A sentence of periodic imprisonment may be for a term up to 2 years, or the longest sentence of imprisonment that could be imposed for the offense, whichever is less. The term of the sentence shall be calculated upon the basis of the duration of its term rather than upon the basis of the actual days spent in confinement.

Chapter 38, Section 1005-8-1:

(a) A sentence of imprisonment for a felony shall be an indeterminate sentence set by the court under this Section.

(b) The maximum term shall be set according to the following limitations:

* * *

(4) for a Class 3 felony, the maximum term shall be any term in excess of one year not exceeding 10 years.

Chapter 38, Section 1008-2-4:

Prosecution for any violation of law occurring prior to the effective date of this Act is not affected or abated by this Act. If the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purposes of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced.

Chapter 131, Section 4:

(This statute is presently located in Chapter 1, § 1103 of the 1981 Illinois Revised Statutes, without change.)

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.

STATEMENT OF THE CASE

On August 26, 27 and 30, 1971, Benedetto J. Massarella gave false testimony under oath in judicial proceedings which he himself commenced against the Illinois Department of Revenue and some of its employees in the Circuit Court of Cook County, Illinois, for the purpose of enjoining the defendants from continuing a criminal tax investigation of Massarella and his solely owned corporation, Bee Jay's Truck Stop, Inc.

On the dates when he gave false testimony, perjury under Illinois law was an offense that could be punished by a fine and, or, a penitentiary term of from one to 14 years, or by incarceration in a penal institution other than a penitentiary for up to one year. The alternative feature of punishment other than incarceration in a penitentiary resulted in the offense being classified a misdemeanor under Illinois law.[1]

In January, 1973, Illinois adopted a Unified Code of Corrections (the "Code") in which perjury was classified a felony. This occurred 16 months after Massarella gave the false testimony. The statute of limitations, both before and after enactment of the Code, was 18 months for misdemeanors and 36 months for felonies.

Massarella was indicted along with several others for conspiracy, perjury, and theft of $425,407 of state motor fuel taxes on June 8, 1973, 22 months after his commission of perjury. He moved to dismiss the perjury charges, alleging that the indictment was returned beyond the 18-

[1] Classification of crimes as either misdemeanors or felonies affects consequences of punishment not only as to the place of incarceration but as to the right to pursue certain licensed occupations and to vote.

month statute of limitations. The trial judge held that the statute had been extended to 36 months before it had run as to Massarella's criminal acts.

Massarella was tried by a jury in 1974, and verdicts of guilty were returned against him for conspiracy, perjury and theft of $425,407 in state motor fuel tax funds. Illinois law requires the merger of substantive and inchoate offenses at sentencing, and therefore the conspiracy conviction was vacated.

When Massarella appeared for sentencing on January 8, 1975, the trial judge, in accordance with the provisions of the Code with respect to superseding mitigating penalties, offered him the option of being sentenced under the statutes in effect at the time his criminal acts were committed or under the Code. The Code attempted to unify and organize various statutes relating to crimes and punishments. It provided for certain lesser alternative forms of punishments such as "conditional discharge" and "periodic imprisonment" not found in the prior statutes. It reduced the maximum penitentiary term for the offense of perjury from 14 years to 10 years but increased the possible fine from $1,000 to $10,000. After conferring with his attorney, Massarella elected to be sentenced under the provisions of the Code.

The trial judge sentenced Massarella on the theft charge to five years' probation conditioned on his serving two of those years in periodic imprisonment, imposed a $10,000 fine, and ordered him to pay restitution to the State in the amount of $425,407. As to the perjury conviction, the judge sentenced Massarella to a penitentiary term of from one to three years and imposed a fine of $10,000. The judge also ordered that the term of periodic imprisonment for theft run concurrently with the penitentiary sentence for perjury and that any time served under periodic imprisonment be credited against the penitentiary term.

Massarella appealed the convictions and sentences to the Illinois Appellate Court. That court first reversed, holding that the Illinois Attorney General, who had prosecuted the case, did not have statutory power to prosecute such offenses under Illinois law. *People v. Massarella*, 53 Ill.App.3d 774, 368 N.E.2d 507 (1st Dist. 1977). The Illinois Supreme Court subsequently reversed and remanded for consideration of other issues which had not been decided by the appellate court. 72 Ill. 2d 531, 382 N.E.2d 262 (1978). On remand, the appellate court affirmed all convictions in a 26 page opinion. 80 Ill. App.3d 552, 400 N.E.2d 436 (1st Dist. 1979). (Appendix C). The Illinois Supreme Court denied Massarella's petition for leave to appeal. 81 Ill.2d 586 (1980). This Court denied a petition for writ of certiorari. 449 U.S. 1077 (1981).

Massarella then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois. The district court judge denied the petition. 510 F. Supp. 1082 (N.D. Ill. 1981) (Appendix B). The United States Court of Appeals for the Seventh Circuit, on July 14, 1982, reversed and remanded, holding that although there was no *ex post facto* violation resulting from the extension of the statute of limitations, the reclassification of perjury under the Code meant that Massarella stood convicted of a felony for which he was subject to adverse collateral consequences. The court of appeals ordered the district court to issue the writ and to order the state to resentence Massarella under "the law in place when [the] crime occurred." ..... F.2d ..... (7th Cir. 1982) (Appendix A at 5a). However, Illinois law still gives Massarella the option to elect under which statute he wishes to be sentenced. Thus an apparent conflict exists between state law and the court of appeals' mandate.

Both the petitioner and respondent filed petitions for rehearing *in banc*, which were denied on September 23, 1982. (Appendix H)

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION BELOW IS IN CONFLICT WITH THIS COURT'S HOLDINGS IN *FRANCIS v. HENDERSON, WAINWRIGHT v. SYKES* AND *ENGLE v. ISAAC.*

When he denied the petition for writ of habeas corpus, the district court judge held that Massarella, having been afforded the option of being sentenced under either of two statutes, had made a reasoned election to be sentenced under the superseding one and therefore did not suffer a deprivation of his constitutional rights as regards the *ex post facto* clause. (Appendix B at 1b-3b). The Illinois Appellate Court had also so held. (Appendix C at 5c). Illinois statutes give a criminal defendant the right to make an election of laws whenever an applicable statute has been changed after commission of an offense but before sentencing. Ill. Rev. Stat., 1973, Ch. 131, §4; see also, Ill. Rev. Stat., 1973, Ch. 38, §1008-2-4. Thus Massarella's voluntary election to be sentenced under the Code was one that he shared with all other defendants similarly situated.

This election on the part of Massarella should have foreclosed federal habeas corpus review in this case. When he elected to be sentenced under the Code, he voluntarily rejected his right to be sentenced under the repealed statute. *Francis v. Henderson*, 425 U.S. 538 (1976), *Wainwright v. Sykes*, 434 U.S. 880 (1977) and *Engle v. Isaac*, ... U.S. ....., 102 S.Ct. 1558 (1982) were, and are, pertinent since even the court below recognized that Massarella "rationally chose to be sentenced under the later law, which set a higher fine but a lower maximum sentence for perjury," (Appendix A at 3a), and

the district court judge found that Massarella "must have considered himself benefited by the sentencing regimen of the new act or presumably he would have chosen the old one." (Appendix B at 3b).

Massarella's voluntary selection of optional sentencing statutes should have been held to foreclose habeas corpus relief.

II.

THE OPINION BELOW DEFIES CONTROLLING STATE DECISIONAL LAW AS TO THE CONSTRUCTION OF ILLINOIS STATUTES.

The court below found that Massarella's sentence carried with it the consequences of a felony conviction under Illinois law. Since the State of Illinois has never attempted to assert any of the collateral consequences incident to felony convictions against Massarella, both he and the court of appeals only speculate that such a result will follow from the state criminal proceedings. This is patently erroneous. The court below ignored an Illinois statute which precludes retroactive application of enhanced classifications of crimes. Former Ill. Rev. Stat., 1973, Ch. 131, §4 (presently Ill. Rev. Stat., 1981, Ch. 1, §1103) prohibits any retroactive substantive legislative changes except provisions mitigating penalties, forfeitures or punishment *when consented to by the defendant.* According to the judgment order (See Appendix F), Massarella was convicted only as charged in the indictment, which was for violating the *1970* statute classifying the offense of perjury as a misdemeanor. (Appendix G)

In another earlier opinion, the court below held that the last mentioned statute precludes *ex post facto* application of a criminal law and that it only allows for retroactive application of *mitigating* effects, if consented to by

the defendant. *James v. Twomey*, 466 F.2d 718, 721 (7th Cir. 1972). The opinion below is inconsistent with that opinion.

Twomey correctly perceived Illinois law in the way that the Illinois courts have interpreted it: *People v. Collins*, 37 Ill.App.3d 202, 345 N.E.2d 730, 732-3 (1st Dist. 1976) (holding that a misdemeanor cannot be retroactively made a felony); *People v. Liebling*, 36 Ill.App.3d 1073, 344 N.E.2d 520, 523 (1st Dist. 1976) (holding that there can be no *ex post facto* application of a new law to the detriment of a defendant); and *Vendo Company v. Stoner*, 58 Ill.2d 289, 310, 321 N.E.2d 1, 12, *cert. denied* 420 U.S. 975 (1974) (holding that no statute is retroactive unless expressly made so). The Code was not expressly made retroactive *except as to mitigating punishments* (Ill. Rev. Stat., 1973, Ch. 38, §1008-2-4), and by virtue of Ch. 131, §4, such retroactive application was further conditioned on defendant's consent. The court below therefore erred in failing to defer to controlling Illinois decisional and statutory law. *Cf. Shad v. Borough of Mount Ephraim*, ... U.S. ....., 101 S.Ct. 2176, 2181 (1981).

This Court in *Engle v. Isaac* discussed the costs imposed on our federal system by improvident grants of writs of habeas corpus. Massarella's election to be sentenced under one statute during state criminal proceedings and his subsequent complaint about alleged incidental consequences of that election smack of gamesmanship. Consider his strategy: 1) In his Petition for Rehearing to the Court of Appeals he states:

> Secondly, defendant was made to elect in the trial court whether to be sentenced under the new law or the old law. (Tr. 2295-97, 2302). He chose the new law. (See Sl. Op. p. 3, fn. 3). The Court's decision, requiring that he be resentenced under the old law,

> cannot be carried out without doing grave violence to defendant's most basic constitutional rights.

(Appendix D at 7d-8d). As part of a Motion for Stay of Mandate Pending Application for Writ of Certiorari To The Supreme Court, Massarella's appellate counsel in an affidavit states: "[I]f resentence time comes at the State level . . . [a]ppellant would argue that no sentence at all could be imposed." (Appendix E at 2e-3e).

These statements foretell that Massarella will, when the case is returned for resentencing, insist that state law gives him the right to elect sentencing statutes and that federal constitutional law restricts that right—at least as interpreted by the court of appeals in this case—and therefore the State of Illinois cannot sentence him under any circumstances. The opinion below should be reversed to prevent this type of abuse of the writ of habeas corpus.

III.

THE COURT SHOULD RECONSIDER *BROWN v. ALLEN* AND FURTHER DEFINE THE SCOPE OF COLLATERAL REVIEW UNDER 28 U.S.C. §2254.

Massarella had a full and complete review of the *ex post facto* question in the state courts. The adequacy and fairness of the state process are unassailable; the only meaningful issue brought over to the federal courts was the correctness of the judicial conclusions as to the application of the *ex post facto* clause to the circumstances in this case.

The court of appeals disagreed with both the state courts and the district court judge as to whether there was, in fact, an *ex post facto* violation. Regardless of the correctness of the opposing conclusions, Massarella was afforded an adequate and fair review of his constitutional claims prior to filing his habeas corpus petition. The

issue upon which the court of appeals ordered the writ did not involve the fact-finding process of determining guilt or innocence.

This Court should reconsider the implications of its opinion in *Brown v. Allen*, 344 U.S. 443 (1953), and in view of the extent to which courts have gone in interpreting that opinion, should formulate further guidelines, consistent with the objectives of 28 U.S.C. §2254, which will avoid excessive collateral review of state judicial proceedings.

IV.

THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE *EX POST FACTO* CLAUSE.

The Illinois Uniform Code of Corrections states that "(p)rosecution for any violation of law occurring prior to the effective date of this Act is not affected or abated by this Act." Ill. Rev. Stat., 1973, Ch. 38, §1005-8-1. Also, Chapter 131, §4 (presently Ch. 1, §1103) stated that:

> If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

The court below in *James v. Twomey*, *supra*, at 721, said as to the last mentioned statute: "Almost by definition, this prevents [a new criminal statute] from being a constitutionally proscribed *ex post facto* law." Thus, the only basis for the court of appeals' decision was that an "*ex post facto* violation" occurred during the course of the judicial proceedings and not by reason of the legislative enactment of the Code.

But, judicial action does not implicate the *ex post facto* clause. As this Court stated more than half a century ago:

> [T]he constitutional prohibition: "No state shall . . . pass any bill of attainder, *ex post facto* law, or law

> impairing the obligations of contracts," as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.

Frank v. Mangum, 237 U.S. 309, 344 (1944). *See also Marks v. United States*, 430 U.S. 188, 191-92 (1977). The legislative enactment of the Code explicitly and zealously prohibited *ex post facto* punishments. Furthermore, Massarella knew beforehand what punishment he was subject to because he decided which of the two penalty provisions he would be sentenced under. Thus he was forewarned of the penalty by what was "on the books" when he elected to be sentenced under the Code. *Cf. Dobbert v. Florida*, 432 U.S. 282, 297 (1977). To withhold the option either then or now would invite equal protection complaints. *Cf. Id.* at 301. The court of appeals compounded its error by misapprehending the *ex post facto* clause as well as the governing Illinois law.

V.

THE COURT OF APPEALS ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO RESPONDENTS.

The burden of proving a federal constitutional claim on federal habeas corpus review lies with the petitioner. 28 U.S.C. 2254(d); *Wolfrath v. LaVallee*, 576 F.2d 965, 971, *cert. denied* 439 U.S. 933 (2nd Cir. 1978); *Braxton v. Estelle*, 641 F.2d 392 (5th Cir. 1981). Massarella's "proof" was simply that he had elected to be sentenced under the new Code, which also happened to classify perjury as a felony.[2]

---

[2] Although the possible fine was increased under the Code, the maximum period of incarceration was reduced. When considered *in toto*, the punishment cannot be said to have been more onerous simply because of the increase in the fine. *Cf. Dobbert v. Florida*, 432 U.S. 282, 294, 97 S.Ct. 2290, 2299; *Weaver v. Graham*, ... U.S. ....., 101 S.Ct. 960, 969 (Rehnquist concurring).

Without requiring any other showing from Massarella that felony conviction consequences attended the defendant's election, the court of appeals ruled that it was the state's burden to prove the negative of the petitioner's claims, that is, that Massarella would not suffer adverse collateral consequences by virtue of the reclassification aspect of the new statute. (Appendix A at 4a-5a). The court of appeals' holding erroneously shifted the burden of proof to the respondents, while at the same time rejecting their arguments as to the safeguards afforded by Ill. Rev. Stat., 1973, Ch. 131, §4, and Ch. 38, §1008-2-4.

VI.

THE COURT OF APPEALS ERRED WHEN IT REVERSED WITHOUT MAKING A DETERMINATION THAT THE DISTRICT COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS.

The district court judge denied the petition for writ of habeas corpus in a six-page written order. (Appendix B). In pertinent part, he found that the defendant, by voluntarily electing to be sentenced under the new statute, relinquished any *ex post facto* claims. *Id.* at 3b.

The court of appeals did not evaluate, analyze or criticize the district court's order. Nor did it make the requisite determination that the district court's finding was manifestly erroneous. *Cf. United States ex rel. Crump v. Sain*, 295 F.2d 699, *cert. denied*, 369 U.S. 830 (7th Cir. 1961). It was error for the court of appeals to disregard the district court's finding that Massarella relinquished any *ex post facto* claim by virtue of his election to be sentenced under the new code. *See James v. Twomey*, 466 F.2d 718, 720-21 (7th Cir. 1972); *cf., Engle v. Isaac*, ... U.S. ....., 102 S.Ct. 1558, 1570-72 (1982).

VII.

THE COURT OF APPEALS' OPINION IS UNCLEAR AND AMBIGUOUS AND INVITES SUBSTANTIAL ADDITIONAL APPELLATE LITIGATION.

The court of appeals' opinion, considered in its entirety, holds that the defendant's conviction for perjury was proper, but orders the case to be remanded for resentencing because of what it believes to be the *possibility* of *ex post facto* felony consequences. The court ordered the case remanded to the state trial court "to permit the state court to apply, if possible, the law in place when his crime occurred." Appendix A at 5a.

Yet in the course of its opinion, the court states that:

> We hold, therefore, that Massarella's *conviction* of the retroactively reclassified offense of perjury violated the *ex post facto* clause.

(Emphasis added) Appendix A at 5a. In addition, the court of appeals' order to the state court to apply the law in place when the crime occurred creates an apparent conflict with state law, which requires that any mitigating provisions of superseding statutes be made available to defendants. Thus, no matter what sentence is imposed by the state court, the ambiguity of the court of appeals' opinion will cause years of additional state and federal appellate litigation in addition to the eight years that have already passed and creates unnecessary friction in federal-state relations.

This Court recently warned that the writ of habeas corpus entails significant costs to the state and federal judicial systems, and that "the writ undermines the usual principles of finality of litigation, . . . degrades the prominence of the trial itself, . . . [and] frustrate[s] both the states' sovereign power to punish offenders, and their

good faith attempts to honor constitutional rights." *Engle v. Isaac*, ... U.S. ....., 102 S.Ct. at 1570-72.

The defendant in this case was convicted eight years ago and, as matters now stand, the only thing that can be said is that the case will require even further examination to decide whether the Illinois courts can withhold the right of election from this defendant as they have been ordered to do by the court below. This result is not sensible.

The case does not involve "manifest injustice," affecting guilt or innocence. Massarella was fairly tried in the state court and allowed to choose which of the two sentencing statutes he wanted to be sentenced under.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully urges this Court to grant this petition for writ of certiorari and, upon review, to reverse the court of appeals' decision ordering the issuance of a writ of habeas corpus.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner

E. JAMES GILDEA
Special Assistant Attorney General
401 North Michigan Avenue, Suite 3400
Chicago, Illinois 60611
(312) 222-0800

Of Counsel

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